No. 80-1996

IN THE

Supreme Court Of The United States

October Term, 1980-81

Andrew L. Freese, 2d, Petitioner

vs.

United States, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY

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July 1981

Questions Presented

1. Is the SAWTOOTH ACT an ex post facto law cutting the ground from under the mineral entryman after he initiated a right to purchase his valid locations by patent under the general mining law of 1872 prior to the SAWTOOTH ACT's prohibition of patents?

2. Does the SAWTOOTH ACT violate the Due Process clause of the Vth Amendment to the U.S. CONSTITUTION in prohibiting the completion of the prior, valid locations in the SAWTOOTH NATIONAL RECREATION AREA by patent in only two counties of the U.S. without amending the general mining law of 1872, so that a few miners can no longer obtain title to their property on which their ore deposits are located?

3. Does the SAWTOOTH ACT violate the just compensation clause of the U.S. CONSTITUTION's Vth Amendment in that a taking of one of the entrymen's bundle of interests in their property, the completion of the valid mineral location process by patent, has occurred for the public purpose of Recreation, creating liability for just compensation or invalidation of these sections of the SAWTOOTH ACT.

4. Did Congress intend in the SAWTOOTH ACT by its savings clause "Subject to valid existing rights," for the AREA miners to be compensated for the divestment, restriction, or encumbrance to their property interests by loss of patent out of the $19 million appropriated for land and interests in land, and the $26 million appropriated for acquisition of improvements with or without consent of the owners? Should the Administrators be ordered to pay?

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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

I

This July 1981 BRIEF IN OPPOSITION defaults on the first two questions presented. From the start in 1978 in the original PETITION below to February 1981, the unconstitutionality of PUB.L. 92-400 (SAWTOOTH ACT) Sec 12 was presented on the prohibition of ex post facto law and its conflict with the due process protection of the Fifth Amendment, which includes life, liberty, as well as property. Defendant relies on shrinking the questions presented from four to two, making brief comment inescapable.

In pristine March 16, 1810, we find the great CHIEF JUSTICE himself saying "A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both."; *Fletcher v. Peck*, Mass. 1810, 10 U.S. 87, 6 Cranch 87, a property case. And recently we note "Vice of attainder is that the legislature has decided for itself that certain persons possess certain characteristics and therefore are deserving of sanctions, not that it failed to sanction others similarly." *U.S. v. Brown*, Cal. 1965, 85 S.Ct. 1708.

As to the second question presented but omitted by Defendant, the due process clause says ". . . not be deprived of life, liberty, or property without due process of law . . ." This clause means more than staying off the chopping block or out of jail. For example, in *KENT v. Dulles*, 357 U.S. @ 125, Justice Douglas for the majority: "The right to travel is part of the liberty of which a citizen cannot be deprived without due process of law under the Fifth Amendment." The right to patent a valid claim is a substantial liberty established for a century. Any process is not due process.

Petitioner avers this COURT need look no further past the Government's ommission to deal with Question 1 and 2 presented (Pet. inside cover) to find P.L. 92-400 Sec 12 unconstitutional on its face.

II

On page 1 of BRIEF FOR THE UNITED STATES IN OPPOSITION, error avers that on March 26, 1981, an untimely motion for review en banc was filed. Counsel has the record showing that the MOTION was filed timely Feb. 1981. Answer by Defendant was then replied to by Plaintif, all prior to decision printing April 3, 1981 (Pet. App 1a) hardly possible if MOTION had been filed March 26, 1981. Petitioner calls it prejudicial under the circumstances for the Government to try to take advantage of a typographical error by COURT OF CLAIMS itself in the

printing of the denial of the en banc review MOTION, which did NOT rule the timely MOTION to be untimely. That MOTION intended to introduce newly discovered evidence regarding, among other things, affidavits from officials of a mine previously operating with 26 miners that closed after the Sawtooth Act, yet was offered by Defendant as an example of mining undisturbed by the SAWTOOTH ACT.

III

The actual first step to patent is location with recordation of valid discovery, followed by inquiry at the office that issues them. Agreement of parties exists that this much was done (Opposition 2). Since INTERIOR took the position that the SAWTOOTH ACT precluded the issuance of patents, despite the savings clause "Subject to valid existing rights" (Sec. 10), one of which was the right to patent both ore and land, further first steps were effectively barred by the Government. Petitioner frequently has called attention in the record that Elmer Swanson's extensive "first steps" in 1967 and 1971 to patent valid locations were denied in 1974 by INTERIOR BOARD OF LAND APPEALS, citing the SAWTOOTH ACT and calling attention to the opinion of CHAIRMAN ROY TAYLOR, HOUSE Sub-Committee Parks and Recreation to the view that taking the patent right probably required compensation. Petitioner could not reasonably be expected to have been treated otherwise.

Thus elaborate contentions smoothly suggesting Petitioner at fault for omitting to do what he is obstructed from doing by the Government are not relevant, but distracting. The Government while holding title in trust for the valid locator disposed of it anyway for public recreation without test as to whether one or all heretofore settlers would by access to the long established patent process harm the recreation purpose, without test of the effect on the miners' ordinary use of their property. Petitioner, for example was threatened with trespass if he continued to build a small tool house and a legally required powder house in an obscure place on his own valid locations — an

assault not available to Government if the land was patented. Nor have scenic easements been paid to any miner in the AREA, altho control of his improvements is manifest.

If test is made on Defendant contention that there is no conflict in any decision of this COURT with COURT of CLAIMS decision, a contrary finding occurs.

In *Andrus v. SHELL OIL CO.*, 466 U.S. 657 (1980) which among others Government alleges do not aid his case (Brief 7), we find the CHIEF JUSTICE saying there is no time limit to perfect the location process by patent. Yet this is what the SAWTOOTH ACT has done — not giving five years to the heretofore miners but by stopping them altogether including SWANSON (above) who applied a priori.

Another area of agreement lies on BRIEF 4, where *NOYES v. MANTLE*, and *CAMERON v. UNITED STATES* refer to the Government holding title "in trust". This agreement, glossed over, lasts till the next word; "BUT", indicating a clash in decisions by the following BENSON interpretation by DEFENDANT, which conflicts with the normal interpretations even of *Benson* that a miner was protected even if certificate of title was not issued. One notes also (BRIEF 4) that NOYES AND CAMERON "refer in dicta"; why are there no dicta in BENSON? Noted further is that *UTAH* relied on heavily below has dropped out of the case already, perhaps because in this action below the case was bifurcated into liability and damages by stipulation. Also disappearing is the ISOLATED TRACTS case declared inapposite to mining in the original decision (WILLCOXSON) but relied on below anyway. Tragedy to dispossessed homesteaders, but the Government virtuously urges that there is no dispossession of Sawtooth miners, so due process attaches its shield to the expectation of patent.

No conflict? In the recreation Series 460 a thru z of TITLE 16, we discover 10 statutes relating to mine patents in a manner that could hardly be more capricious if by design. These AREAS cover time from 1965 to 1980. Only the SAWTOOTH ACT flatly prohibits patents of valid locations heretofore made. Compare this flat prohibition of the SAWTOOTH ACT's Sec. 12, which IS an unconstitutional nullity (BRIEF 8) with the section of the KING RANGE CONSERVATION AREA.

> KING RANGE CONSERVATION AREA 16 USCS § 460y-6
> **§ 460y-5. Applicability of mining laws; prospecting commenced or conducted and mining claims located subsequent to October 21, 1970 as subject to regulations; patents issued on mining claims located subsequent to October 21, 1970 as subject to regulations; provisions of regulations; rights of owner of existing valid mining claim as unaffected**
>
> (a) Subject to valid existing rights, nothing in this Act [16 USCS §§ 460-y et seq.] shall affect the applicability of the United States mining laws on the federally owned lands within the Area, except that all prospecting commenced or conducted and all mining claims located after the effective date of this Act [Oct. 21, 1970] shall be subject to such reasonable regulations as the Secretary may prescribe to effectuate the purposes of this Act [16 USCS §§ 460y et seq.]. Any patent issued on any mining claim located after the effective date of this Act [Oct. 21, 1970] shall recite this limitation and continue to be subject to such regulations. All such regulations shall provide, among other things, for such measures as may be reasonable to protect the scenic and esthetic values of the Area against undue impairment and to assure against pollution of the streams and waters within the Area.
>
> (b) Nothing in this section shall be construed to limit or restrict rights of the owner or owners of any existing valid mining claim.
>
> (Oct. 21, 1970, P. L. 91-476, § 6, 84 Stat. 1070.)

Petitioner submits that the above legislation squares with the CONSTITUTION, while the SAWTOOTH ACT's Sec. 12 does not.

BRIEF IN OPPOSITION p. 6 avers treatment of homestead laws govern treatment of mining locations, which have long and usually been regarded as of their own kind. General propositions do not decide particular cases — HOLMES. If there are no conflicts, why does DEFENDANT need to go outside the mining law to buttress its OPPOSITION?

Therefore, to show the COURT the conflict at least of lawyer views, the full text of the letter found on pages 183-184 of HEARINGS BEFORE SUB-COMMITTEE ON NATIONAL PARKS AND RECREATION, held June 7 & 8, 1981, Serial No. 92-13, 92d Congress, 1st Session is appended altho already in the record below.

IV

As the record below shows, high government officials in both the executive and legislative branches not only deemed it reasonable but probable that the taking of the patient right in the SAWTOOTH ACT would require compensation.

Defendant's BRIEF sometimes finds opinions of INTERIOR DEPARTMENT have weight; sometimes not.

BRIEF IN OPPOSITION p. 8 is averred to contain faulty logic. Question 4 presented notes that BECAUSE of Sec. 12, taken with opinion in both executive and legislative branches of probable requirement to compensate fo. the patent right taking, Congress may have intended that the sums in question are to be used in part for that very purpose. Without this, Sec. 12 is indeed a nullity. The funds under Sec. 12 are not for future acquisition of patents, but taking the right to patent heretofore valid locastions from the miners in two counties only, BLAINE & CUSTER, IDAHO. Petitioner avers things have been twisted around here.

V

CONCLUSION

The Government does not argue THIS COURT's jurisdiction, instead, holding that the COURT below did not err; and PETITION FOR WRIT OF CERTIORARI should be denied.

In view of the inability of the Government to face the first two issues presented in the PETITION at all, and the conflicts averred with regard to the meaning of the law and dispute over precedents, and how the law squares with the Constitution on the 3d and 4th issues presented, the need for plenary review of the action below is indisputable; indeed petitioner suggests that summary reversal is now in order.

Respectfully submitted,

Andrew L. Freese, 2nd
Petitioner

JULY 1981

APPENDIX FOLLOWS

HOLLAND & HART,
Attorneys at Law,
Denver, Colorado, June 14, 1971.

MR. KEITH WHITING,
Supervisor, American Smelting and Refining Co.,
Spokane, Wash.

DEAR MR. WHITING: You have asked us for our opinion as to whether Section 14 of H.R. 6957 (A Bill to establish the Sawtooth National Recreation Area) constitutes a violation of the constitutional limitation that private property shall not be taken for public use without just compensation. Section 14 provides that "patent shall not hereafter be issued for locations and claims heretofore or hereafter made in the area . . ." The bill specifically provides that it "shall not be construed as preventing or interfering with the full exercise of the rights of the holder of a valid claim to further prospect, develop, and mine any such claim . . ."

Therefore, it would seem that the issue raised by Section 14 is whether Congress can constitutionally deny the holder of a valid claim the right to proceed to patent. Our conclusion is that the present statutory right of a valid claimholder to proceed to patent is a property right which becomes vested when a claim is located and which cannot be constitutionally divested by the Government without payment of compensation.

Every prior statute which has withdrawn lands from the public domain has excepted from the withdrawal all valid existing rights. 1 American Law of Mining § 2.62. These exceptions have been construed to permit one who lawfully initiated a claim before withdrawal to obtain a patent subsequent to withdrawal. *Stockley v. United States*, 260 U.S. 532 (1922). It has always been assumed in the statutes, and the assumption is supported by case law, that a valid mining claim is an equitable estate in land which includes the right to acquire a patent.

In *Fort Maginnis*, 1 L.D. 552 (1881), the Secretary of War desired an opinion of the Attorney General as to whether mining claims located prior to the reservation might thereafter be taken to patent. The Attorney General answered that "so long as [the locater] complies with the conditions imposed by [the mining laws]" those laws confer possessory rights which, as "recognized by Congress, are property of great value". The Attorney General thus concluded that:

"That where such rights are attached to mineral land in favor of the locater of a mining claim the land during the continuance of the claim (i.e., so long as it is maintained in accordance with law) . . . cannot, while that right exists, notwithstanding the title thereto remains in the government, be set apart by the executive for other uses." 1 L.D. at 554.

In *United States v. Etcheverry*, 230 F.2d 193 (10th Cir. 1956), the court held that a valid unpatented mining claim carries with it an "absolute" right to the issuance of a patent and that the issuance of the patent was therefore not discretionary with the Government. The Court said:

"*When a mining location is perfected* and there has been compliance with the statute, the owner has an absolute right to purchase a fee title to the land at any time thereafter." 230 F.2d at 197. (Emphasis added.)

It is clear then that a claim must only conform to the law under which it was initiated in order to vest in the claimant the right to a patent, which right is subject to divestment only upon failure to fulfill the statutory conditions existing at the time of the location of the claim. *Cameron v. United States*, 252 U.S. 450 (1919). In the leading case of *Noyes v. Mantle*, 127 U.S. 348 (1888), the Supreme Court commented upon the nature of the estate granted upon the perfection of a mining claim when it stated:

"They had thus done all that was necessary under the law for the acquisition of exclusive right to possession and enjoyment of the ground. The claim was thenceforth their property. They needed only a patent of the United States to render their title perfect, and that they could obtain at any time upon proof of what they had done in locating the claim, and of subsequent expenditures to a specified amount in developing it. Until the patent issued, *the government held the title in trust for the locaters or their vendees. The ground itself was not afterwards open to sale.*" (Emphasis added.)

The premise that the estate granted to the mining locater is a vested equitable fee simple estate is supported by the fact that the legal title obtained by the patentee relates back in point of time to the date of the original location. *Reed v. Munn*, 148 F. 737 (8th Cir. 1906), *cert. den.* 207 U.S. 588. While the Government continues to hold the naked legal title to the land prior to the issuance of a patent and while the estate of the locater is subject to divestment for failure to fulfill the statutory requirements, it is our conclusion that the estate granted to the locater is vested and [t]he United Sta[t]es as legal title holder cannot deprive the mining locater of his right to the legal title without making just compensation.

You have asked us also for our opinion as to whether or not compensation would be required if valid unpatented claims were condemned by the Government. It has been repeatedly held that a valid mining claim is an interest in real property in the fullest sense of the term. *Wilbur v. United States*, 280 U.S. 306 (1930). It is not disputed that a valid mining claim on public land, as yet unpatented, cannot be taken from the owner thereof under the power of eminent domain

except on the payment of just compensation. *North American Transportation & Trading Co. v. United States*, 253 U.S. 330 (1920). *Phillips v. United States*, 243 F.2d 1 (9th Cir. 1957).

If you have any questions in regard to the above, please feel free to contact me.

Yours very truly,

FRANK H. MORISON.

Mr. McClure: I have no questions.

Mr. Lloyd: No questions.

Mr. Taylor: Thank you very much, Mr. Whiting.